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DIGEST OF OTHER RECENT VIRGINIA DECISIONS.

Supreme Court of Appeals.

Note.—In this department we give the syllabus of every case decided by the Virginia Supreme Court of Appeals, except of such cases as are reported in full.

NORFOLK & O. V. RY. CO. *v.* CONSOLIDATED TURNPIKE
CO et al.

June 9, 1910.

[68 S. E. 346.]

1. Estoppel (§ 68*)—Change of Position in Subsequent Judicial Proceedings.—A litigant cannot in a subsequent proceeding take a position in conflict with that taken by him in a former proceeding, which latter position is to the prejudice of the adverse party, where the parties are the same and the same questions are involved; and hence, where the purchaser at a receiver's sale of land subject to a trust deed, which lands the receivers had sought to condemn, claimed under the condemnation proceedings brought by the receivers, and enjoined the trustee and another from enforcing the trust deed until there was a decision in such proceedings, such purchaser could not subsequently, in the condemnation suit, deny that the receivers who brought such proceeding had authority to institute it, or that their petition therein was sufficient.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 165-169; Dec. Dig. § 68.* 5 Va.-W. Va. Enc. Dig. 282, et seq.; also, 14 Id. 409, et seq.]

2. Appearance (§ 9*)—"General Appearance."—An appearance for any other purpose than questioning jurisdiction for want of process, defect of process, defective service thereof, or because the action was commenced in the wrong county, etc., is general, and not special, though accompanied by the claim that the appearance is special; and hence an appearance to move to vacate a cause, or to dismiss or discontinue it, because plaintiffs' pleading does not state a cause of action, which is equivalent or analogous to a demurrer, amounts to a general appearance.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 42-52; Dec. Dig. § 9.* 1 Va.-W. Va. Enc. Dig. 669; also, 14 Id. 115.

For other definitions, see Words and Phrases, vol. 4, pp. 3051, 3052.]

3. Estoppel (§ 68*)—Change of Position in Subsequent Judicial Proceeding.—Where the purchaser at a receivers' sale of land subject to a trust deed, which land the receivers had sought to condemn, claimed under the condemnation proceedings brought by the receivers, and

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

by alleging the pendency thereof long after the expiration of three months from the date of filing of the commissioners' report obtained an injunction restraining the trustee and another from subjecting the property sought to be condemned to the trust deed, such purchaser was estopped from subsequently contending that the condemnation suit should ipso facto be vacated and dismissed on the ground that the report of the condemnation commissioners had been filed more than three months without payment of the damages either to the owner or into court, as expressly required by Code 1904, § 1105f, subsec. 27.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 165-169; Dec. Dig. § 68.* 5 Va.-W. Va. Enc. Dig. 282, et seq.; also, 14 Id. 409, et seq.]

4. Eminent Domain (§ 133*)—Condemnation—Compensation—Improvements by Condemning Party.—Where a corporation, with power of eminent domain, takes possession of land for its purposes under a warranty deed, and makes improvements, and afterwards institutes condemnation proceedings to extinguish a trust deed, the value of the improvements should not be considered in ascertaining compensation.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 361½; Dec. Dig. § 133.* 5 Va.-W. Va. Enc. Dig. 91, et seq.; also, 7 Id. 320, 14 Id. 390; 526.]

5. Eminent Domain (§ 241*)—Condemnation Proceedings—Personal Judgment.—Under Code 1904, § 1105f, subsecs. 9-13, relating to the method of payment for land taken, if the condemning company is not in possession when the report of commissioners is confirmed, it can acquire title and right of possession only by paying such sum into court, or to the party entitled; and if such company is in possession at such time, as it may be where there has been a prior report not confirmed, and the confirmed report increases the compensation, the condemning company has no right to possession until full payment into court, or to the party entitled, and the statute confers no authority to enter a personal judgment. Held, that a personal judgment is improper and hence a judgment requiring the condemning company to pay the sum ascertained into some national bank in a specified city within three months was erroneous.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 621, 624; Dec. Dig. § 241.* 5 Va.-W. Va. Enc. Dig. 96.]

6. Eminent Domain (§ 167*)—Condemnation Proceedings—Construction of Statute.—Though the words of a statute are broad enough in their literal extent to comprehend existing cases, they must be constructed as applicable only to cases that may thereafter arise, unless a contrary intention is unequivocally expressed therein; and

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

there being nothing in Code 1904, § 1105f, subsec. 27 as amended by Acts 1906, c. 257, providing that if, in a condemnation proceeding, the amount ascertained by the commissioners be not paid either to the party entitled or into court within three months from the filing of the report, the proceedings shall, on defendant's motion, be vacated as to him, and not otherwise, to show that it was intended to have a retroactive effect, it cannot be deemed to have such effect.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 451; Dec. Dig. § 167.* 12 Va.-W. Va. Enc. Dig. 773 et seq.; also, 14 Id. 954.]

7. Eminent Domain (§ 255*)—Writ of Error—Necessity for Objections in Lower Court.—Where no objection was made in the lower court in condemnation proceedings that the commissioners' report was not in accord with the order appointing them, the question cannot be raised on writ of error.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 666; Dec. Dig. § 253.* 1 Va.-W. Va. Enc. Dig. 547, et seq.; also, 14 Id. 87, et seq.]

Error to Circuit Court, Norfolk County.

Condemnation proceedings by the Norfolk & Ocean View Railway Company against the Consolidated Turnpike Company and others. From an order allowing compensation for the land taken, including the value of improvements placed thereon, and directing plaintiff to deposit the same, plaintiff brings error. Reversed and remanded.

Groner & Taylor and *Munford, Hunton, Williams & Anderson*, for plaintiff in error.

N. T. Green and *C. H. Burr*, for defendants in error.

COMMONWEALTH ex rel. NORTON BOARD OF TRADE, INC.,
v. NORFOLK & W. RY. CO. et al.

June 9, 1910.

[68 S. E. 351.]

1. Railroads (§ 9*)—Regulation—Corporation Commission—Powers.—Const. § 156b (Code 1904, p. cclii), provides that the Corporation Commission shall have power to supervise and control all transportation companies doing business in the state in all matters relating to their public duties, correct abuses therein, and prescribe and enforce rates and rules and regulations, and shall require the establishment and maintenance of all such public service and conveniences as may be reasonable and just, etc. Held, that the power imposed on the commission referred to matters relating to the performance of

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